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IN THE
Supreme Court of the United States

DAVID G. SZYMANSKI,

Petitioner,

v.

FLETCHER-HARLEE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the complete and capricious abnegation of procedural protection in Pennsylvania that resulted in imposition upon the individual Petitioner of a default judgment against a corporation violated the due process clause of the Fourteenth Amendment.

LIST OF PARTIES

David G. Szymanski, Petitioner.

Fletcher-Harlee Corporation, Respondent.

The Superior Court incorrectly listed David Concrete Corporation, Inc., as a defendant in the caption of this case; the trial court dismissed the Complaint as against David Concrete Corp., Inc. by Order entered December 7, 2004.

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David G. Szymanski respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal may be found at 956 A.2d 435 (2008) (Petitioner's Appendix ("App.") at 53a). The Pennsylvania Superior Court's opinion is reported at 936 A.2d 87 (2007). (App. at 1a). The opinion of the Court of Common Pleas, Chester County, Pennsylvania, is not reported but is included in the Appendix. (App. at 35a).

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal On September 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States Provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Delmarva Concrete, Inc., entered into a contract with Fletcher-Harlee Corporation, under which Delmarva was to provide labor and materials for the concrete portion of an elementary school project. After Delmarva had performed a substantial portion of the concrete work (for which it had not been paid) a dispute arose that ultimately led to arbitration proceedings in October 2001. Prior to arbitration, however, Delmarva was forced to cease business operations because its receivables exceeded $500,000 – *not including* upwards of $200,000 that Fletcher-Harlee itself owed Delmarva for the materials and labor already performed on the elementary school. Accordingly, in August 2001, Delmarva filed its final tax return.

When thereafter the defunct corporation failed to appear and defend against Fletcher-Harlee's arbitration claim, on October 10, 2001, the arbitrator entered an award *by default* against Delmarva in the amount of $330,195.04, including attorneys' fees, interest, and costs. After reducing the award to judgment in Philadelphia, Fletcher-Harlee commenced suit in Chester County, Pennsylvania, to collect on the judgment. Fletcher-Harlee named several defendants in its Complaint, including David Szymanski (an individual shareholder of Delmarva), Delmarva's Office Manager and other former or current business entities, all of whom, except Szymanski, were dismissed from the action before trial.

At trial, Fletcher-Harlee argued that Delmarva's corporate existence should be pierced and Szymanski held liable for the debts of the corporation. In support of this theory, Fletcher-Harlee pointed to what it characterized as a series of money transfers between Delmarva and Szymanski, that it claimed left Delmarva undercapitalized. But Szymanski accounted for all of the alleged transfers at trial, to the satisfaction of the trial court.[1]

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1. Fletcher-Harlee first alleged that the final tax return of Delmarva contained an entry for $273,908, which Fletcher-Harlee attempted to characterize as a cash distribution to Szymanski. The corporation's accountant debunked this assertion, however, explaining that the entry was a paper transfer only – which was *required* in order to zero out the corporation's receivables for final taxation purposes; in fact, no distribution had occurred. Fletcher-Harlee also questioned the existence of "loans" from Szymanski to Delmarva. However, the accountant testified that these loans were necessary to keep the business operating when it possessed a large amount of receivables – which is quite common in the construction industry. The accountant further explained that the loans from Szymanski to Delmarva were not only *proper* for accounting purposes, but were the equivalent of "paid in capital," which is vital to, and *expected* in, a small S-Corporation such as Delmarva. Additionally, the accountant testified that Szymanski not taking money out of the corporation as distributions, rather he was leaving receivables in and trying to build up the company. The accountant testified unequivocally that he observed no fraudulent activity associated with Delmarva. Fletcher-Harlee also challenged several checks received from a construction management firm, which Fletcher-Harlee claimed were "undocumented" and made payable to either Delmarva or Del Concrete Company. With the exception of the smallest check identified ($8,767), Szymanski accounted

(Cont'd)

In addition to debunking each of Fletcher-Harlee's contentions, Szymanski presented evidence refuting that he commingled assets with the corporation, and establishing that Delmarva had a separate corporate existence and documented all business transactions in its corporate ledger, maintained operating, payroll and money market accounts, documented its corporate minutes, maintained its own office space, successfully performed numerous construction projects, and filed accurate corporate tax returns.

Based on the evidence presented, the trial court determined that Fletcher-Harlee had failed to sustain its burden of showing that Delmarva's corporate form should be disregarded. Specifically, the trial court determined that Delmarva *was not a sham corporation* and its corporate existence should not be disregarded because, *inter alia*: Fletcher-Harlee had demonstrated no substantial

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(Cont'd)

for each of these checks, which were duly recorded in the same corporate ledgers that Fletcher-Harlee had introduced at trial. Further, Szymanski testified that the reason why some of the checks were issued to Delmarva and others to Del Concrete was because they constituted payments for two different jobs – St. Cornelius Church, which was performed by Delmarva concrete, and McClafferty Printing, which was performed by Del Concrete. Finally, Fletcher-Harlee questioned a transfer of $370,000 from Delmarva to David Concrete, which like the other transfers challenged by Fletcher-Harlee, was completely legitimate. Szymanski noted that these monies were transferred to David Concrete because David Concrete did the concrete flatwork on a construction project, which amounted to $362,000, prior to any change orders. Delmarva "subbed" the flatwork out to David Concrete because David Concrete was a non-union contractor and capable of performing the flatwork at $2.00 per square foot.

intermingling of corporate and personal affairs (Trial Ct. Op., at 40a); no use of the corporate form to perpetrate a fraud; no injustice or illegality (Trial Ct. Op., at 40a); recognition of Delmarva as a valid corporate entity would not defeat some aspect of public policy (Trial Ct. Op., 40a); Szymanski did not artificially or improperly create Delmarva's inability to respond to its creditors (Trial Ct. Op., at 44a); and Fletcher-Harlee had failed to demonstrate that the payments in question were for anything other than legitimate business expenses. (Trial Ct. Op., at 44a.) Fletcher-Harlee then appealed the trial court's decision.

By Opinion and Order entered October 15, 2007, a two-member panel of Pennsylvania's Superior Court *vacated* the trial court's verdict and remanded for entry of judgment in favor of Fletcher-Harlee. The Court acknowledged the hazy parameters of piercing the corporate veil in Pennsylvania, then disregarded proper standards of appellate review and overturned the trial court's decision on the remarkable basis that the trial court should have analyzed the case pursuant to a decades-old Superior Court decision that antedated the Pennsylvania Supreme Court's most recent decision. The Superior Court's Opinion also *subjectively* assigned greater weight to particular factors than the trial court had used in its piercing analysis. (*See* Super. Ct. slip op., at 29a-32a). Szymanski sought reconsideration of the Superior Court's decision, which the Court denied by Order entered December 13, 2007.[2] He then sought Allocatur from the

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2. The Superior Court incorrectly listed David Concrete Corporation, Inc. as a defendant in the caption of this case; the trial court dismissed the Complaint against David Concrete Corp., Inc., by Order entered December 7, 2004.

Pennsylvania Supreme Court, which that Court denied by Order dated September 3, 2008. (Attached hereto as 53a).

The Pennsylvania courts repeatedly have held that concepts of due process under the Pennsylvania Constitution and the Federal Constitution are coextensive. *See, e.g., Pennsylvania Game Comm'n v. Marich*, 542 Pa. 226, 229 n.6, 666 A.2d 253, 255 n.6 (1995)("the requirements of Article I, Section I of the Pennsylvania Constitution are not distinguishable from those of the 14th Amendment"); *Willcox v. Penn Mut. Life Ins. Co.*, 357 Pa. 581, 590, 55 A.2d 521, 526 (1947) (Article I, Section 1 of the Pennsylvania Constitution is substantially equivalent to the federal due process clause); *Griffin v. SEPTA*, 757 A.2d 448, 452 (Pa. Commw. Ct. 2000) (in circumstances where plaintiff argued that statutory cap on damages violates the substantive due process guarantees of both the Pennsylvania and federal constitutions, court saw no need to separately analyze the two constitutions "as the substantive due process protections afforded under both constitutions are analyzed the same and thus are coextensive.") There is no occasion to wonder whether a reference to "due process," either in parties' briefs or in a court's opinion, invites due process analysis independent of that found in federal cases. Cf. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

This case is a paradigm of the abject failure of fundamental notions of due process in the United States in the Twenty-First Century. Through a spectacular default in process in the courts of Pennsylvania, the individual Petitioner, David G. Szymanski, has been held *personally* liable for a claim arising out of a business transaction to which Szymanski was not a party. That business claim was never tested in any forum since the company that allegedly was liable for it had failed, and a judgment by default was entered against the demised entity. Through judicial sleight of hand, that default judgment, entered against a corporation, was then imposed on Szymanski.

The modicum of procedural process that Szymanski received in a Pennsylvania trial court was revoked when the state's intermediate court simply substituted its own findings for that of the trier of fact, and created a novel, and chaotic "standard" for piercing the corporate shield.

Pennsylvania's Supreme Court then declined to review the matter – whether because it was too busy with other matters or, distracted, failed to appreciate the importance of the rights and issues at stake will never be known.

As a result, an instance of obvious injustice and of clear failure of procedural process has gone ignored. And the outcome is that one hard working individual citizen's life has been diminished forever. The result in this case is wholly inconsistent with the Fourteenth Amendment's guarantee of due process.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE SINCE IT RESULTS IN WRONGFUL IMPOSITION OF PERSONAL LIABILITY FOR A CLAIM THAT WAS NEVER TESTED BY ANY TRIBUNAL.

The Pennsylvania Superior Court's decision violates basic notions of due process. By cavalierly substituting an individual involved in operation of a duly organized corporation for that entity as judgment debtor, the court ignored the facts that it: 1) denied the individual any opportunity to challenge the underling claim; 2) in violation of its own appellate standards of review, simply substituted its subjective view of facts on a cold record for that of the trial court, thus imperiously revoking the only due process that Syzmanski had received; and 3) as if that were not enough, announced a wholly subjective "standard" for piercing the corporate veil that ostensibly permits appellate judges to weigh the piercing factors according to individual whim and caprice.

The Fourteenth Amendment command that no state shall "deprive any person of life, liberty, or property, without due process of law" distills centuries of Anglo-American jurisprudence.[3] In his famous argument in the Dartmouth College case (1819), Daniel Webster declared that the "law of the land" (another way of talking about

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3. Chapter 39 of Magna Carta (1215) forbade proceedings save by "the law of the land" – a phrase, which soon became synonymous with "due process of law."

due process of law) requires a law "which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 517, 581 (1819).

Due process is bound up with notions of fundamental fairness. Modern cases have declared that, at its minimum, due process requires notice and hearing. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).[4] As Justice Felix Frankfurter noted, the "validity and moral authority of a conclusion largely depends on the mode by which it was reached." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). More concretely, due process requirements of notice and hearing aim at accuracy in fact-finding so that "substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The requirement of a fair hearing is not satisfied, of course, by a pretext or a facade. The hearing that is provided must be meaningful. In particular, a party must not, through no fault of his own, be precluded from arguing the merits of his case. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The essence of a meaningful hearing lies in a party's ability to present evidence supportive of his arguments in the case. In *Little v. Streater*, 452 U.S. 1 (1981), the mother of a newborn infant claimed *Little* was the father. In the ensuing paternity suit, *Little*, claiming indigence, asked that blood tests be performed at the state's expense,

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4. Due process is also taken to require a neutral and disinterested magistrate. *Tumey v. Ohio*, 273 U.S. 510 (1927).

but that motion was denied. This Court reversed, reasoning that *Little* had been denied "the most probative additional evidence" needed to rebut the mother's testimony. This amounted to the denial of a "meaningful opportunity to be heard" and thus a failure to satisfy the due process requirement of "fundamental fairness." 452 U.S. at 12, 16. Szymanski, of course, does not ask the state to pay for evidence. But the parallel between the present case and *Little* is striking. By first stripping Szymanski of a well-reasoned trial court decision after his only due process hearing, and second, imposing on Szymanski a judgment entered by default, Pennsylvania has essentially denied Szymanski "the most probative additional evidence" needed to defend himself against Fletcher-Harlee's claims. A party barred from seeking critical evidence does not, of course, have to show that the evidence, if admitted, would lead to a successful outcome for that party. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 512, 544 (1985). But the requirement of a "meaningful hearing" means that the party must not be pushed into the ring with one or both hands tied behind his back.

It is commonplace to be reminded that the requirements of due process vary with the circumstances of the proceeding. *See, e.g., Hannah v. Larche*, 363 U.S. 420, 441-42 (1960). The state has legitimate interests to be considered. But the Court's "balancing" of government and private interests most often takes place in the context of administrative, rather than judicial, proceedings. In such cases, the "ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."

Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (holding that an evidentiary hearing was not required prior to termination of Social Security disability payments). Holdings in cases like *Mathews* turn in good part on the government's interest in "conserving scarce fiscal and administrative resources" lest the cost of extensive administrative hearings diminish resources available for the social program itself. 424 U.S. at 348.

No such concerns are involved in the present case. The question is not whether there should have been a judicial forum; there was at least one. The question is whether, having made the state courts available to a plaintiff like Fletcher-Harlee, the state can then use its procedures and evidentiary rulings to deny the defendant, Szymanski, a meaningful hearing.

This Court is understandably sparing in exercising its powers of review where procedural rules in state courts are involved. But where life, liberty, or property are involved – and the money judgment against Szymanski undeniably takes property from an individual citizen – it is the Constitution, not state law, which is the measure of due process of law. The state defines causes of action, creates courts and agencies, delineates jurisdiction, and defines rules of evidence and procedure. But, all the same, the state must respect federal constitutional guarantees such as due process of law.

It is not often that the Supreme Court has to oversee a state court paternity proceeding. But it did that in *Little v. Streater*, 452 U.S. 1 (1981). It is not often that the Court has to review how states go about

suspending drivers' licenses. But, despite the Court's sensitivity to the state's interest in highway safety, the Court undertook such review in *Bell v. Burson*, 402 U.S. 535 (1971).

This is a case about fundamentals. Petitioner invokes a right long deemed central to the constitutional guarantee of due process of law. The courts must be more than merely open to litigants. The rules of the game must assure a meaningful hearing, including providing a remedy for a party unable to present crucial evidence because of the conscious action of the other party. Otherwise, the Constitution's sonorous guarantee of due process becomes "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

Fletcher-Harlee, its counsel, and the Pennsylvania courts deprived Szymanski of the opportunity to defend himself against Fletcher-Harlee's claims when his corporation, Delmarva, was unable to continue in business for economic reasons, including Fletcher-Harlee's own indebtedness, and Szymanski subsequently was deprived of the protections of law and found liable for the default judgment against Delmarva.

By analogy, the decisions of the Pennsylvania appellate courts fly in the face of the Sixth Amendment right to confront one's accusers:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense,

> the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Taylor v. Illinois, 484 U.S. 400, 409 (1988) (*quoting Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this is not a criminal case, Szymanski is no less entitled to a fair trial than is a criminal defendant. Nonetheless, the actions of Fletcher-Harlee and the Pennsylvania courts effectively prevented Szymanski from confronting his accusers and presenting a defense.

This Court has recognized that the procedures mandated by due process vary "according to specific factual contexts," that "not all situations calling for procedural safeguards call for the same kind of procedure."[5] Nevertheless, it is obvious that this situation demanded that *some* relief – either in the form of application of a uniform and objective rule of law, or a remand for a new trial on the merits of Fletcher-Harlee's claims – be afforded to Szymanski in order to neutralize the clear prejudice that had been caused by Szymanski being called upon to answer for the debt of another. And, to the extent that the decision below was based on Szymanski's inability to satisfy the appellate

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5. *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

court as to his *credibility*, the decision places an unreasonable, if not insurmountable, burden on the party responding to allegations of commingling and fraud, who has no opportunity to establish credibility in the appellate arena.

Despite expressly recognizing that there is "no clear test" for piercing the corporate veil in Pennsylvania, the Pennsylvania Superior Court overturned the trial court's verdict on the purported basis that the trial court should have assigned greater weight to certain considerations subjectively deemed more significant by the Superior Court panel. While the Superior Court acknowledged the Pennsylvania Supreme Court's controlling precedent on the subject – *Lumax Indus., Inc. v. Aultman*, 543 Pa. 38, 669 A.2d 893 (1995) – the Superior Court nonetheless mistook Pennsylvania's current, imprecise "piercing" criteria for no standard at all, promulgated its own subjective views and conducted its own *de novo* review – in plain violation of the appellate standard of review.

In *Lumax* the Pennsylvania Supreme Court manifested a plain intent to preserve the sanctity of the corporate structure barring *extraordinary* evidence of clear impropriety. In setting aside a decision to pierce the corporate veil – the *Lumax* Court emphasized the "*strong presumption* in Pennsylvania *against* piercing the corporate veil." *Lumax*, 543 Pa. at 41, 669 A.2d at 895 (emphasis added).[6] To this end, the *Lumax* Court

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6. The *Lumax* Court further noted that the strong presumption will endure "even if stock is owned entirely by one person." *Id.*, 543 Pa. at 42, 669 A.2d at 895.

set forth the following four objective factors to be considered: (1) *undercapitalization*; (2) *failure to adhere to corporate formalities*; (3) *substantial intermingling* of corporate and personal affairs; and (4) use of the corporate form *to perpetrate a fraud*. *Lumax*, 543 Pa. at 42, 669 A.2d at 895 (emphasis added)[7].

In this case, the trial court itself applied the *Lumax* factors. Upon considering the evidence presented and having assessed the demeanor and credibility of the witnesses, the trial court determined that Fletcher-Harlee failed to sustain its burden. While the trial court's opinion indicated a 2-2 split under *Lumax*, the trial court found that *there was no fraud, illegality or injustice*, nor was there any contravention of public policy in recognizing Delmarva as a corporate entity. (Trial Ct. Op., at 37a-39a.) Rather, the court found that the evidence presented by Fletcher-Harlee established only that Delmarva was a traditional corporation that was organized for the purpose of preventing personal liability – which "is one of the primary reasons why corporations are formed." (Trial Ct. Op., at 44a-45a.) The trial court also found that Szymanski did not artificially or improperly create Delmarva's inability to respond to its creditors, and that Fletcher-Harlee had failed to

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7. *Lumax*, however, does not articulate the precise degree of proof necessary to overcome the strong presumption in favor of corporate preservation; nor does *Lumax* indicate how the four factors are to be applied in the analysis, including the quantum of proof necessary to establish each factor, whether some factors (such as fraud and substantial intermingling of personal affairs) should be accorded greater weight, and whether only some or most or all four factors must be established before a corporate entity properly could be disregarded.

demonstrate that the payments it questioned were for anything other than legitimate business expenses. (Trial Ct. Op., at 44a.) The trial court ultimately concluded that Fletcher-Harlee's evidence merely reflected a portrait of American business: "After all is said and done, all that happened here is that a corporate subcontractor . . . is unable to pay damages to the contractor for the subcontractor's failure to have performed that contract." (Trial Ct. Op., at 45a-46a.)

On Fletcher-Harlee's appeal, when the Superior Court rejected the trial court's analysis by forging its *own* piercing standard and conducting its own *de novo* review on a cold record – even judging credibility as though it were the finder of fact – the Superior Court deprived Syzmanski of the due process hearing he had been given before the trial court.[8] Despite arriving at the same 2-2 split under *Lumax*, the Superior Court proceeded to "tip the scales" in favor of Fletcher-Harlee by placing its *own emphasis* on justice and equity considerations[9].

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8. The Superior Court also erroneously charged the trial court with misapprehending the piercing standard: "[t]he [trial] court opined that, if the court determines that one of these [piercing] circumstances is present, then the court can disregard the corporate form." (Super. Ct. slip op, at 6a). In fact, the trial court made no such statement; conversely, the trial court's opinion manifests a thorough understanding of the law pertaining to piercing the corporate veil. (Trial Ct. Op., at 36a-39a, 44a-45a).

9. In doing so, the Superior Court relied on its own decision in *The Village at Camelback Property Owners Ass'n, Inc. v. Carr ("The Village")*, 371 Pa. Super. 452, 538 A.2d 528 (1988):

> **In deciding whether to pierce the corporate veil, courts are basically concerned with determining**

(Cont'd)

Then, viewing the evidence as if it had presided at trial, the Superior Court found that "Szymanski himself disregarded the separate legal status of Delmarva," intermingled his personal and business interests, *and was not credible.* (Super. Ct. slip op., at 30a-31a). Based on this cold-record fact-finding, the Superior Court swung the apparently *dispositive* injustice variable in Fletcher-Harlee's favor, and concluded that "no two reasonable minds could disagree [that the evidence] was sufficient to overcome the presumption against piercing the corporate veil." (Super. Ct. slip. op., at 31a-32a.)

The actual trier of fact, however, after hearing the evidence on a first-hand basis, had come to *the exact opposite conclusion.* The trial court found that Delmarva was a legitimate corporation – and for good reason. Delmarva was not a "fly-by-night" company; it was a productive concrete business, which, like any other business, had valid, documented expenses. It maintained an accurate corporate ledger, which

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(Cont'd)

> **if equity requires that the shareholders' traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a façade for the operations of the dominant shareholder.**

(Super. Ct. slip op., at 30a) (emphasis in original) (quoting *The Village*, 371 Pa. Super. at 461, 538 A.2d at 533). However, the Pennsylvania Supreme Court's subsequent decision in *Lumax* clearly does not authorize a court to resolve "close calls" by turning to other considerations, much less subjective considerations of "equity."]

corresponded to bank records, held corporate meetings and recorded its minutes, and it duly filed accurate tax returns. The Superior Court's second-guessing of the trial court's determinations – in order to weigh what the Superior Court cast as the predominant factor in a piercing analysis – is manifestly improper.[10]

Rather than abiding by the strong presumptions in favor of corporate protection and in favor of upholding the trial court decision, the Superior Court manifested a capricious disregard for the corporate form. Indeed, the Superior Court found (as did the trial court) that the arguably weightiest two factors – fraud and substantial intermingling of assets – ***had not been established at trial***. While the Superior Court found that the remaining two factors – undercapitalization and failure to adhere to corporate formalities had been established – these two factors simply cannot comprise the basis for piercing the corporate veil, lest every business (big and small) in Pennsylvania and throughout the United States would be in peril of losing its corporate structure at any given moment. Undercapitalization is not a fair gauge for determining the legitimacy of a corporation, particularly for small businesses, because

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10. To the extent that the Superior Court concluded that the trial court should have considered certain other evidence or case law in evaluating this case under the piercing the corporate veil standard, the Superior Court should have remanded the matter for consideration of the proposed evidence or case law, with direction to issue its findings and conclusions based thereon. There is no authority for the Superior Court to have decided this case outright and reversed the judgment of the trial court.

they cannot be held responsible to cover every unforeseen liability or for calamitous changes in the business or economic climate[11]. Not until Fletcher-Harlee obtained an excessive judgment against the corporation was Delmarva forced to cease operations. However, a substantial judgment against *any* small business has the potential to close its doors. Similarly, failure to adhere to corporate formalities plainly *cannot be accorded similar weight to the* ***fraud*** *or* ***substantial intermingling*** factors of the *Lumax* test. Failure to adhere to various corporate formalities may be a matter of inattention; it does not equate to brazen disregard of the separate existence of the corporation or misuse of the structure for personal gain, which are embodied in commingling and fraud. These two factors essentially constitute the *sine qua non* of corporate impropriety.

The Superior Court ignored the question it was asked by Fletcher-Harlee to review, and it blatantly contravened the well-established standard of appellate review in Pennsylvania:

> The proper standard of review for an appellate court when examining the lower court's refusal to grant a judgment n. o. v. is whether, *when reading the record in the light most favorable to the verdict winner and granting that party every favorable inference therefrom*, there was sufficient competent evidence to sustain the verdict. Questions of

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11. Indeed, in the instant case, Szymanski was owed more than $500,000 and was infusing his own funds into the defunct corporation to keep it afloat – and more importantly, the business was productive.

> credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence. Absent an abuse of discretion, the trial court's determination will not be disturbed.

Adamski v. Miller, 545 Pa. 316, 319, 681 A.2d 171, 173 (1996) (emphasis supplied); *see also Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 413-14 (Pa. Super. 2004) (the test is not whether the reviewing court would have reached the same result on the evidence presented, but whether, upon consideration of the evidence that the trial court found credible, the trial court could have reasonably reached its conclusion).

The Superior Court's decision not only reflects an unsophisticated understanding of the realities of the small business world, but in according equal weight to clearly less significant factors, puts every corporation at risk. Rather than seizing the opportunity to confirm that the strong presumption against piercing the corporate veil *requires clear and convincing proof*, and further assign weight to the various factors and articulate how the factors are to be applied in the piercing analysis, the Pennsylvania Supreme Court then turned a blind eye to the patent injustice vested on Szymanski by the Superior Court, and the denial and deprivation of Szymanski's due process rights that resulted from the Superior Court's decision.

The Superior Court's Opinion manifests all too plainly that the Court *did not* view the record in the light most favorable to the verdict winner and consistently failed to grant Szymanski every favorable evidentiary inference; the court accorded *no deference* to the trial court but instead conducted *de novo* review; and on a cold record it reweighed the evidence and assessed witness credibility. The totality of these errors combined to completely strip Szymanski of the only due process he had received – before the trial court.

CONCLUSION

This Court must not permit an individual citizen to be deprived of property where the charade of state procedures do not accord due process protection. Accordingly, Petitioner, David G. Szymanski, respectfully requests that this Court grant his petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA FILED OCTOBER 15, 2007

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3424 EDA 2006

FLETCHER-HARLEE CORPORATION,

Appellant

v.

DAVID G. SZYMANSKI and
DAVID CONCRETE CORPORATION, INC.,

Appellees.

BEFORE: JOYCE*, J., McEWEN, P.J.E. and COLVILLE**, J.

Argued June 6, 2007

Filed October 15, 2007

Reargument Denied December 13, 2007

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* Judge Joyce did not participate in the consideration or decision of this case.

** Retired Senior Judge assigned to the Superior Court.

Appendix A

OPINION BY COLVILLE, J.:

¶ 1 This is an appeal from a judgment entered in favor of Appellee David Szymanski ("Szymanski") and against Appellant Fletcher-Harlee Corporation ("Appellant"). For the reasons that follow, we vacate the judgment entered below and remand the case for entry of judgment in favor of Appellant.

¶ 2 The factual and procedural backgrounds underlying this matter can be summarized as follows. Szymanski has been the sole shareholder, director, and officer of several corporations, all but one of which performed concrete contracting work. One such corporation was Delmarva Concrete, Inc. ("Delmarva").

¶ 3 Appellant was a general contractor for the construction of an elementary school. Appellant subcontracted the concrete work for this project to Delmarva. A dispute arose between Appellant and Delmarva during the construction of the elementary school. This dispute caused Appellant to seek the intervention of the American Arbitration Association. Delmarva decided not to participate in the arbitration, and Appellant was awarded the sum of $313.179.52 plus fees. Appellant converted this award into a judgment against Delmarva.

¶ 4 Delmarva ceased doing business, primarily due to the judgment Appellant held against Delmarva.[1]

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1. Delmarva also was engaged in litigation with a carpenters' union, which apparently played into the decision to have Delmarva stop doing business.

Delmarva eventually filed for bankruptcy. Szymanski, however, remained in the concrete business and performed jobs through Del Concrete, Inc. ("Del Concrete"), another corporation of which Szymanski was the sole shareholder, director, and officer.

¶ 5 In April of 2004, Appellant filed a complaint against Szymanski, Karen Brooks ("Brooks"),[2] David Concrete Corporation ("David Concrete"), S & C Properties, Dave's Contracting, Inc., and Del Concrete. Appellant's complaint contained several counts. Most important for purposes of this appeal, Appellant sought to pierce Delmarva's corporate veil in order to hold the various defendants liable for the judgment Appellant had obtained against Delmarva. The complaint also contained, *inter alia*, a fraudulent transfers count and a count entitled "recipients of fraudulent transfers." Appellant's Complaint, 4/1/04, at 20.

¶ 6 All defendants filed preliminary objections in which they argued, *inter alia*, that the trial court lacked personal jurisdiction over them. The trial court sustained in part and denied in part the defendants' preliminary objections. Pertinent to this appeal, the court determined that it lacked personal jurisdiction

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2. Brooks was the office manager for David Concrete (another of Szymanski's concrete businesses), Delmarva, and Del Concrete. Other than Szymanski, she was the only employee of these companies. She also performed work for S & C Properties, another corporation for which Szymanski served as the sole shareholder, officer, and director. According to Brooks' deposition testimony, her duties did not change from entity to entity.

over all defendants except for Szymanski. Appellant filed a motion for reconsideration of this determination, which the trial court denied.

¶ 7 A nonjury trial began on December 5, 2005, and continued the next day. However, Szymanski's testimony, coupled with other factors, made it evident to the trial court that Szymanski failed to comply with the court's various pre-trial discovery orders.[3] The court, therefore, suspended trial to allow Appellant to conduct additional discovery. The trial reconvened on May 10, 2006, and concluded the following day.

¶ 8 In an order filed on July 28, 2006, the trial court found in favor of all defendants and against Appellant. The court refused to disregard Delmarva's corporate status, in part because the court found that Appellant failed to prove that it was the victim of common law fraud. The court also determined that Appellant did not prove its claim of fraudulent transfers, stating, *inter alia*, that Appellant "failed to prove that transfers of assets by Delmarva were other than in payment of valid antecedent debts." Trial Court Order, 7/28/06, at n. 1.

¶ 9 Appellant timely filed a motion for post-trial relief in which it requested a new trial or, in the alternative, judgment not withstanding the verdict. In the motion, Appellant cited *Lumax Industries v. Aultman*, 543 Pa.

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3. During the end of testimony on December 5th, the trial court commented, "[Szymanski] didn't produce what he didn't produce, which is pretty much everything one would assume exists." N.T., 12/5/05, Afternoon Session, at 72.

38, 669 A.2d 893 (1995), for the proposition that, in Pennsylvania, a court is required to consider several factors when it is asked to pierce the corporate veil. Appellant contended that the trial court failed to consider these factors and, instead, improperly focused on whether Appellant was the victim of common law fraud. Appellant insisted that it was not required to prove common law fraud in order to establish its claim that Szymanski should not be shielded from personal liability simply because he incorporated Delmarva. On November 22, 2006, the trial court denied Appellant's motion for post-trial relief.

¶ 10 On December 5, 2006, the trial court ordered Appellant to comply with Pa.R.A.P.1925(b). The following day, Appellant filed a notice of appeal in which it gave notice that it was appealing the court's November 22, 2006, order.[4] On December 18, 2006, judgment reflecting the court's orders was entered. The next day, Appellant filed a Pa.R.A.P.1925(b) statement. For reasons undisclosed by the record, judgment again was entered on January 3, 2007.[5] The trial court then issued its opinion in compliance with Pa.R.A.P.1925(a).

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4. The record does not reveal why the court ordered Appellant to comply with Pa.R.A.P.1925(b) before Appellant's notice of appeal was filed and docketed.

5. While Appellant purported in its notice of appeal that it was appealing from the trial court's order denying its motion for post-trial relief, such orders are not appealable until they are reduced to judgment. *Jones v. Rivera*, 866 A.2d 1148, 1149 n. 1 (Pa.Super.2005). However, because judgment subsequently was entered, this appeal is properly before this Court. *See id.*

¶ 11 As to Appellant's arguments concerning piercing Delmarva's corporate veil, the trial court asserted that Appellant "substantially misperceives the law[.]" Trial Court Opinion, 1/11/07, at 2. According to the court, the law in this Commonwealth with regard to piercing the corporate veil requires a court to look at a number of factors in order to determine whether there was fraud, illegality, or injustice or whether recognition of the corporation would defeat some aspect of public policy. The court opined that, if the court determines that one of these circumstances is present, then the court can disregard the corporate form.

¶ 12 As to this case, the trial court found no illegality nor did the court believe that public policy would be contravened if Delmarva's corporate status was upheld. As to whether piercing Delmarva's corporate veil is necessary to avoid an injustice, the court commented that injustice is "a particularly ephemeral concept" and concluded that "the injustice required to be found in order to overcome the strong presumption in favor of recognizing the corporate existence of Delmarva simply is not present." Trial Court Opinion, 1/11/07, at 5. The court also asserted that, while Appellant argues that the court erred in requiring proof of the elements of common law fraud, Appellant failed to suggest why fraud in this context should mean anything different than what fraud means in all other legal contexts.

¶ 13 The court went on to analogize this case to *Sheetz v. Spagnol*, 224 Pa.Super. 85, 302 A.2d 379 (1973). The court, in effect, interpreted *Sheetz* as holding that, when

a person enters a contract with a corporation and that person does not seek a personal guarantee from someone with interests in the corporation (a person with interests such as Szymanski's interests in Delmarva), a court cannot rewrite the contract to shift liability away from the corporation and toward the interested individual.[6]

¶ 14 In its brief to this Court, Appellant asks that we consider the following questions:

> I. Whether the trial court erred as a matter of law in requiring a showing of fraud in order to pierce the corporate veil of [Delmarva]?
>
> II. Whether the trial court erred as a matter of law in declining to find [Szymanski] liable for one or more fraudulent transfers . . . ?
>
> III. Whether the court erred in dismissing [Del Concrete for lack of personal jurisdiction]?

Appellant's Brief at 5.

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6. The court also determined that it properly rejected Appellant's claims that the court erred in finding that Appellant failed to establish its claim of fraudulent transfers and that the court erred in finding that it lacked personal jurisdiction over Del Concrete.

Appendix A

¶ 15 Because this appeal is from an order following a nonjury trial, the following general principles apply to our review:

> . . . Our review in a non-jury case is limited to whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of law. We must grant the court's findings of fact the same weight and effect as the verdict of a jury and, accordingly, may disturb the non-jury verdict only if the court's findings are unsupported by competent evidence or the court committed legal error that affected the outcome of the trial. It is not the role of an appellate court to pass on the credibility of witnesses; hence we will not substitute our judgment for that of the factfinder. Thus, the test we apply is not whether we would have reached the same result on the evidence presented, but rather, after due consideration of the evidence which the trial court found credible, whether the trial court could have reasonably reached its conclusion.

Hollock v. Erie Insurance Exchange, 842 A.2d 409, 413-14 (Pa.Super.2004) (quotation marks and citations omitted).

¶ 16 We further note that, because Appellant sought but was denied judgment notwithstanding the verdict and/or a new trial, the following principles of appellate review also are implicated:

> In reviewing a motion for judgment n.o.v., the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.
>
> There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant[.] With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes

> that the evidence was such that a verdict for the movant was beyond peradventure.

Moure v. Raeuchle, 529 Pa. 394, 604 A.2d 1003, 1007 (1992) (citations and quotation marks omitted).

> Similarly, when reviewing the denial of a motion for new trial, we must determine if the trial court committed an abuse of discretion or error of law that controlled the outcome of the case.

Long et al. v. Mejia et al., 896 A.2d 596, 599 (Pa.Super.2006) (citations omitted).

¶ 17 Under its first issue, Appellant's primary contention is that the trial court did not apply the appropriate test in determining that Appellant failed to prove that piercing Delmarva's corporate veil was proper. Appellant takes specific aim at the trial court's emphasis on the fact that no fraud occurred in this case. Appellant points out that this Court has stated that "the corporate existence can be disregarded without a specific showing of fraud." Appellant's Brief at 19 (quoting *Hanrahan v. Audubon Builders, Inc.*, 418 Pa.Super. 497, 614 A.2d 748, 753 (1992)). Appellant also takes exception to the trial court's conclusion that Appellant, in essence, sought to have the court rewrite the parties' contract to shift liability away from Delmarva and toward Szymanski. Along the same line, Appellant argues that *Sheetz* is distinguishable from this matter.

¶ 18 Appellant then looks to the factors *Lumax Industries, supra,* instructs should be considered when examining whether the corporate entity should be disregarded. As to these factors, Appellant concludes that it proved that Delmarva was undercapitalized, that Szymanski failed to follow corporate formalities and keep relevant records, that Szymanski intermingled his personal funds and assets with those of Delmarva, and that Szymanski used Delmarva in order to perpetrate fraud and injustice. Appellant also puts forward that, despite the fact that the trial court recognized Szymanski's discovery violations and stated that it drew adverse inferences against Szymanski, the court, in fact, did not draw any adverse inferences against Szymanski.

¶ 19 We begin our analysis of this issue by finding that the trial court's reliance on *Sheetz* was misplaced. In *Sheetz*, the parties entered a contract. The first paragraph of the agreement required the defendant/appellant Spagnol to purchase stock of the appellant Penn Albert Corporation ("Penn Albert") from the plaintiffs/appellees at the price of $15,000.00. However, paragraph two of the agreement required Penn Albert to pay to the appellees $20,000.00. The agreement did not specify that Spagnol was in any way responsible for paying the additional $20,000.00. Penn Albert did not pay the $20,000.00, and the appellees sued.

¶ 20 As this Court stated:

> Despite the fact that the agreement sets the 'sales price' payable by defendant Spagnol for

the stock at $15,000, which he has paid, and despite the obvious fact that in paragraph 2 there is no assumption by him of any personal liability for the payment of the $20,000 due by the corporation to the plaintiffs but merely a promise by him (the breach of which has not been claimed or relied upon) that he would exercise his ownership control so that the 'Corporation shall pay', in a sum not to exceed $20,000, the plaintiffs' claims 'against said Corporation', the court below nevertheless found defendant personally liable as a matter of law through the device of piercing the corporate veil. The court reasoned 'that the defendant individual, Arthur J. Spagnol, is attempting to use the Corporation in this case as a shield against his personal liability for the purchase of the stock. To permit this would result in a grave injustice.'

We cannot agree. The claimed injustice or inequity to the plaintiffs arose from the very clear and explicit terms of the agreement in which plaintiffs chose to enter. Had plaintiffs wished the defendant and not the corporation to pay the $20,000, they should have so provided in the agreement. Instead, paragraph 2 refers only to the corporation's payment of its debts to the plaintiffs.

The corporate entity was without any legal basis improperly disregarded by the court

below merely to rewrite the contract so as to provide for personal liability where none was provided. That this cannot be done was clearly shown in *Tucker v. Binenstock*, 310 Pa. 254, 165 A. 247 (1933), where the court, though permitting in that case a disregard of the corporate fiction to avoid the perpetration of a fraud upon the government, carefully noted the distinction between such case and those in which 'we have held that we cannot set aside the corporate entity merely to accomplish or set up what would simply be an individual transaction . . . [.]'

The lower court has in this case, through its improper disregard of the corporate existence, rewritten an explicit contract so as to impose personal liability where none has been contracted. Defendant is not in this case using the corporate fiction to shield himself from liability. There is not the slightest intimation of any fraudulent attempt or calculated intent by defendant Spagnol to conceal himself behind the corporate veil to the detriment of plaintiffs. It is the agreement itself, admittedly valid and freely entered into by the plaintiffs, that shields defendant from the liability sought to be imposed by plaintiffs. To permit the corporate veil to be pierced under these circumstances would be not preventing an injustice but in fact creating

> an injustice by allowing plaintiffs to impose upon defendant a liability different than that they agreed to impose upon him.

Sheetz, 302 A.2d at 381 (emphasis added and some citations omitted).

¶ 21 The above passage demonstrates that this Court simply found that the trial court in *Sheetz* had no legal basis to pierce Penn Albert's corporate veil. Instead, the trial court merely used the concept of piercing the corporate veil as a legal guise to rewrite the parties' contract. *Sheetz*, therefore, does not stand for the proposition that a court cannot pierce the corporate veil when a party entered a contract which assigned liability to a corporation, rather than to an interested individual. Indeed, this Court explicitly has stated that "[s]hareholders, officers and directors are not held liable for the corporation's breach of a contract, **absent ... the successful assertion of the equitable doctrine of piercing the corporate veil.**" *First Realvest, Inc. v. Avery Builders, Inc. et al.*, 410 Pa.Super. 572, 600 A.2d 601, 603 (1991) (emphasis added).

¶ 22 We now turn to the law governing the concept of piercing the corporate veil. It is not difficult to understand why Appellant and the trial court could not agree on the law in this area. As this Court has stated on a number of occasions, "there appears to be no clear test or well settled rule in Pennsylvania . . . as to exactly when the corporate veil can be pierced and when it may

not be pierced."[7] *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC et al.*, 846 A.2d 1264, 1278 (Pa.Super.2004) (quoting *Good v. Holstein*, 787 A.2d 426, 430 (Pa.Super.2001)).

¶ 23 The *Lumax Industries* decision was the last time our Supreme Court discussed piercing the corporate veil. As to the law in this area, the Court stated as follows:

> We note at the outset that there is a strong presumption in Pennsylvania against piercing the corporate veil. Also, the general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person.
>
> Commonwealth Court has set out the factors to be considered in disregarding the corporate form as follows:
>
> > undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and

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7. It is somewhat remarkable that the courts of this Commonwealth have mentioned the unsettled nature of Pennsylvania's law with regard to piercing the corporate veil since at least 1954. *See Barium Steel Corporation v. Wiley et al.*, 379 Pa. 38, 108 A.2d 336, 341 (1954) ("There appears to be no clear test or well settled rule either in Pennsylvania or in the Country at large as to exactly when the corporate veil can be pierced and when it may not be pierced[.]") (citation omitted).

> personal affairs and use of the corporate form to perpetrate a fraud.

Lumax Industries, 669 A.2d at 895 (citations omitted). While this statement of the law hardly is exhaustive, we take from it that the Supreme Court found the factors delineated by the Commonwealth Court to be important considerations in determining whether a party overcame the strong presumption of the validity of a corporation's status as such.

¶ 24 For a more thorough discussion of the law in this area, we turn to this Court's opinion in *The Village at Camelback Property Owners Association, Inc. v. Carr et al.* (" *The Village* "), 371 Pa.Super. 452, 538 A.2d 528 (1988), in which the Court stated as follows:

> Piercing the corporate veil is a means of assessing liability for the acts of a corporation against an equity holder in the corporation. The general standard for piercing the corporate veil is as follows:
>
> > The legal fiction that a corporation is a legal entity separate and distinct from its shareholders was designed to serve convenience and justice, . . . and will be disregarded whenever justice or public policy require and where rights of innocent parties are not prejudiced nor the theory of the

> corporate entity rendered useless. . . . We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate identity may properly be disregarded.

In deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders' traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder. Thus, we inquire, *inter alia*, whether corporate formalities have been observed and corporate records kept, whether officers and directors other than the dominant shareholder himself actually function, and whether the dominant shareholder has used the assets of the corporation as if they were his own.

. . . [T]here is no overriding restriction on piercing the corporate veil to situations where such is necessary to prevent a fraud. Piercing the corporate veil is admittedly an extraordinary remedy preserved for cases involving exceptional circumstances. As some courts have phrased it, liability for the acts of

a corporation may be assessed against the owners thereof wherever equity requires that such be done either to prevent fraud, illegality or injustice or when recognition of the corporate entity would defeat public policy or shield someone from public liability for crime. Nevertheless, the corporate existence can be disregarded without a specific showing of fraud. As we recently stated in *Rinck v. Rinck*, 363 Pa.Super. 593, 526 A.2d 1221 (1987):

> Appellant argues that the corporate veil cannot be pierced unless the court makes a specific finding that he used his professional corporation to commit fraud, illegality or wrongdoing. This is a statement frequently made in the decided cases. Appellant's reliance on this general language, however, fails to acknowledge the scope of the rule which permits the separate corporate entity to be disregarded whenever it is necessary to avoid injustice.

The Village, 538 A.2d at 532-33 (citations omitted). With these principles in mind, we will summarize the pertinent evidence submitted at trial.

¶ 25 Szymanski was the first witness to testify at trial, and his testimony revealed the following. Szymanski was the sole shareholder, officer, and director of Delmarva. He made all of Delmarva's business decisions. Delmarva's corporate office was located at 845 Kiamensi Road, Wilmington, Delaware ("845 Kiamensi Road"), which is the address of a building owned by S & C Properties. S & C Properties was another corporation of which Szymanski was the sole shareholder, officer, and director. S & C Properties' corporate headquarters also was in the building located at 845 Kiamensi Road.

¶ 26 Prior to incorporating Delmarva, Szymanski was the sole shareholder, director, and officer of another concrete business, David Concrete. According to Szymanski, David Concrete utilized nonunion help; he started Delmarva in order to perform jobs utilizing union help. While Szymanski insisted that David Concrete and Delmarva for a time conducted business simultaneously, he was unable to recall when David Concrete stopped doing business.[8] David Concrete's office was in the same building located at 845 Kiamensi Road.[9] Szymanski testified that all of his

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8. When Brooks was asked during her deposition whether any of Szymanski's concrete businesses were in existence at the same time, she responded, "Not that I recall." Plaintiff's Exhibit 60, Oral Deposition of Karen Brooks, 6/18/04, at 52. She further testified that after one entity would close, she would receive a check from the next entity.

9. The first concrete and masonry business Szymanski started was called Delmarva Concrete and Masonry, Inc. Szymanski was the sole shareholder, director, and officer of that company as well. This business also rented office space from S & C Properties.

corporations were located in the same building but in different suites.[10] When asked if he could produce leases between S & C Properties and his other corporations, Szymanski stated that the leases were oral and that the terms of the leases were set by S & C Properties.

¶ 27 After laying this foundation, Appellant's counsel questioned Szymanski extensively about the financial records of his various corporations. This questioning made clear that Szymanski either did not keep proper financial records, purposely withheld from Appellant relevant documents during discovery, or both. Szymanski's proffered excuse for not producing some of the relevant financial records was that he could not find them. The documents Szymanski did provide showed that Szymanski would loan Delmarva money, through his personal money market account, when the company needed money to operate. In fact, Szymanski was Delmarva's largest creditor.

¶ 28 As to the dispute between Delmarva and Appellant, Szymanski testified that he was aware that Appellant filed an action with the American Arbitration Association.

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10. We note, however, that Brooks' deposition testimony suggests that, while the building at 845 Kiamensi Road has four separately designated suites, these suites share an open space. For instance, S & C Properties and Delmarva had different suite numbers, and later, S & C Properties and Del Concrete had different suite numbers; however, according to Brooks, all of these companies shared the same entrance. Moreover, as will be mentioned below, S & C Properties, Delmarva, and Del Concrete all shared a single computer.

He stated that a corporate decision was made not to defend Delmarva in the arbitration proceedings. Szymanski also was aware of the arbitration award Appellant eventually converted into a judgment against Delmarva. Szymanski agreed that a decision was made to stop operating Delmarva basically due to the judgment Appellant procured against Delmarva. Szymanski testified that, at this time, other than accounts receivable, Delmarva had no assets. Delmarva owned no equipment, choosing instead to rent equipment owned by S & C Properties.[11] According to Szymanski, the equipment leases between Delmarva and S & C Properties were oral.

¶ 29 After Szymanski decided to stop operating Delmarva, he began operating Del Concrete. Szymanski was the sole shareholder, director, and officer of Del Concrete. Del Concrete operated out of the same building as all of Szymanski's other corporations. As it turns out, another concrete business, Delaware Concrete Contractors, Inc. ("DCCI"), does business out of 845 Kiamensi Road. Szymanski insisted that he does not own or otherwise have an interest in DCCI. He testified that he is an estimator for the company. Brooks worked (or perhaps works) for DCCI as well.

¶ 30 At one point during Appellant's counsel's examination of Szymanski, counsel asked whether Szymanski ever held out that David Concrete and

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11. None of Szymanski's concrete companies owned equipment. They all rented equipment from S & C Properties and other companies.

Delmarva were the same company. While Appellant responded in the negative, Appellant produced a letter that stated otherwise. This letter is dated March 14, 2001, is addressed to "To Whom It May Concern," and states:

> This letter is to confirm that Delmarva Concrete Corp. and David Concrete Corp. are the same company at the same address. We use David Concrete Corp. for our Suppliers and we use Delmarva Concrete Corp. to our Contractors to Bid under. Should you have any questions, please call my Office Manager at the above number.

Plaintiff's Exhibit 8. The letter's closing stated "Sincerely, David G. Szymanski, Pres.," but Szymanski did not personally sign the letter. Rather, the letter was "By" Brooks and signed by her. Szymanski contended that he had never seen this letter and insisted that it was inaccurate. Thereafter, Appellant produced another letter which stated that Delmarva was "also operating as David Concrete Inc." [12] Plaintiff's Exhibit 9.

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12. Appellant also produced two applications for payment, both of which were submitted for the same job. Szymanski stated that Del Concrete worked this particular job. However, the first application for payment was made by DCCI, and the second application for payment was made by Del Concrete.

It further is worth noting that Appellant produced a letter printed on S & C Properties' letterhead ("S & C letter") which mentioned that a document had been left outside of S & C

(Cont'd)

¶ 31 At this point in his testimony, Szymanski answered many of Appellant's counsel's questions in an equivocal manner and many other questions by stating that "I don't remember" or "I don't know."[13] Later, Appellant's counsel questioned Szymanski about why he had failed to produce bank statements for Del Concrete during discovery. Szymanski stated his believe that he could not find them in the fourteen or fifteen boxes he kept at his warehouse. When asked what things were in those boxes, he stated, "Personal items and business items." N.T., 12/5/05, Afternoon Session, at 53. A recurring theme during Szymanski's testimony was that many of Delmarva's records allegedly were lost because its computer had been scrapped.[14]

(Cont'd)

Properties' door. The S & C letter stated that the company to which the document was to be delivered was no longer renting from S & C Properties and that "they packed up and left in August of 2001 and unfortunately left us no forwarding address. . . ." Plaintiff's Exhibit 11. The referred-to document was a complaint against Delmarva.

13. The trial court understandably found Szymanski's testimony to be, in large part, incredible. *See, e.g.*, Trial Court Opinion, 1/11/07, at 8 ("While we do not credit Szymanski's testimony to any great extent, we do believe that Delmarva had business expenses. . . .").

14. Szymanski and Appellant's president, David Fletcher ("Fletcher"), were the only witnesses to testify on December 5, 2005. Fletcher's testimony did not add much, if anything, relevant to this appeal. We further note that, before the court went on recess in the afternoon of December 5th, Brooks' deposition testimony was admitted into the record without objection.

¶ 32 On December 6, 2005, an accountant, Edward Parker ("Parker"), was called to the stand. Parker had been doing accounting work for Szymanski and his various companies since 2000. Parker was questioned extensively about various financial records of Szymanski and his businesses. Parker stated that he was not aware of any fraudulent transfers in connection to his work with Szymanski and his companies. Notably, Parker indicated that the same computer was used for Delmarva, Del Concrete, and S & C Properties. Parker also testified that he was not aware of any capital contributions made to Delmarva; rather, the only money that ever came into Delmarva was a loan from the officer, *i.e.*, Szymanski.

¶ 33 Following Parker's testimony, Szymanski was called back to the stand. Szymanski testified that his initial concrete company, Delaware Concrete and Masonry, Inc., did union concrete and masonry work. He stated that he formed his second company, David Concrete, simply to do nonunion concrete work. He then formed Delmarva in order to perform union concrete work. He further testified that he incorporated Del Concrete "[t]o get away from union carpenters." N.T., 12/5/05, Afternoon Session, at 103. According to Szymanski, Delmarva was the only company of his that ended in bankruptcy. In addition, Szymanski contended that Delmarva alone entered the contract with Appellant and that he did not have any intention of defrauding Appellant when he entered into the contract on Delmarva's behalf.

¶ 34 Robert Jacobs ("Jacobs") was the next witness to take the stand. Jacobs is an attorney, and he assisted Szymanski with incorporating S & C Properties and with other business-related legal matters. It was after Jacobs' testimony that the trial court determined that Szymanski had not complied with the court's discovery orders. The court, therefore, adjourned the proceedings in order to allow for additional discovery.

¶ 35 When the court reconvened, Appellant called Deborah Davis ("Davis") to testify. Davis is an accounting manager at Pancoast & Clifford, a construction management company. She oversees all of the money that comes in and out of Pancoast & Clifford. Her testimony revealed that the company made out checks to Delmarva or Del Concrete and that, for Pancoast & Clifford's internal purposes, Delmarva and Del Concrete had the same vendor code.

¶ 36 After Davis testified, Szymanski retook the stand. Appellant's counsel extensively questioned Szymanski about his discovery compliance and lack thereof. Moreover, Appellant produced a check that was made out to Del Concrete but which showed up on Delmarva's general ledger. When asked why this occurred, Appellant responded, "I have no idea." N.T., 5/10/06, at 45. Appellant also admitted to putting a company check into his personal account on one occasion. Appellant's counsel then pointed out to Szymanski deposits into his personal bank account in the amounts of $8,166.90 and $75,000.00 and asked him if he knew what the source of those funds was; Szymanski answered in the negative.

Counsel followed by asking Szymanski whether it was possible those deposits were a result of corporate checks being deposited into his account, and Szymanski responded, "I have no idea."[15] N.T., 5/10/06, at 50. Szymanski nonetheless insisted that he did not make a habit of depositing company checks into his personal account.[16]

¶ 37 As a starting point to our final disposition of this issue, we will consider the *Lumax Industries* factors.

Undercapitalization

¶ 38 While the trial court made no findings regarding undercapitalization, it is clear from the record that Delmarva was not appropriately capitalized.[17] When faced with the mere prospect of defending Delmarva in arbitration against the allegations raised by Appellant,

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15. Szymanski also did not know why there were gaps in bank records that were produced for trial.

16. Following Szymanski's testimony, Jacobs testified again. His testimony revolved around his attempts to see to it that Szymanski complied with discovery requests and orders. On the last day of trial, Szymanski was called to testify one last time.

17. The law in this Commonwealth lacks substantial guidance as to what exactly constitutes undercapitalization. Black's Law Dictionary defines undercapitalization as "[t]he financial condition of a firm that does not have enough capital to carry on its business." BLACK'S LAW DICTIONARY 223 (8th ed.2004).

Delmarva decided not to defend itself, to cease doing business, and subsequently to file for bankruptcy. Thus, even when the evidence is viewed in a light most favorable to Szymanski, the inescapable conclusion is that Delmarva did not have enough capital to carry on its business.

Failure to Adhere to Corporate Formalities

¶ 39 As to this factor, the trial court determined that Delmarva failed to adhere to corporate formalities. *See* Trial Court Opinion, 1/11/07, at 4 ("There can be little doubt that Delmarva failed to adhere to corporate formalities with the rigor which would be desirable. . . ."). The record more than amply supports a finding that Delmarva failed to adhere to corporate formalities.

Substantial Intermingling of Corporate and Personal Affairs

¶ 40 Again, the trial court made no findings as to this factor. The record suggests that there may have been some intermingling of funds between and among Szymanski's various corporations. Moreover, it is evident that Szymanski on at least one occasion deposited corporate funds into his personal bank account. In addition, the record suggests that Szymanski stored his corporate and personal records together. However, while it appears that Szymanski, to some extent, intermingled his corporate and personal affairs, when viewed in a light most favorable to Szymanski, the evidence (and all reasonable inferences drawn therefrom) does not

support a conclusion that Szymanski **substantially** intermingled his corporate and personal affairs.

Use of the Corporate Form to Perpetuate a Fraud

¶ 41 Before making any conclusions about this factor, we find it necessary to address the trial court's determination (and Appellant's assertions to the contrary) that, within the context of piercing the corporate veil, proof of fraud equates to establishing the elements of common law fraud.[18] Again, there is a lack of caselaw as to this point of law; thus, the disagreement between Appellant and the trial court easily is understood.

¶ 42 It is clear that any definition of fraud necessarily includes a knowing misrepresentation of a fact by one party which induced another party to act or to fail to act, which, in the end, caused damage to the party who relied upon the misrepresentation. *Compare Colaizzi v. Beck*, 895 A.2d 36, 39 (Pa.Super.2006) ("[T]o establish common law fraud, a plaintiff must prove: (1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result.") ***with*** BLACK'S LAW DICTIONARY 685 (8th ed.2004) (defining fraud as, *inter alia*, "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

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18. We observe, as did the trial court, that Appellant fails to offer an alternative definition of fraud.

¶ 43 Here, Appellant failed to sufficiently demonstrate that Szymanski utilized Delmarva to make a knowing misrepresentation which induced Appellant to act or to fail to act. Thus, we conclude, similarly to the trial court, that Appellant failed to establish that Szymanski perpetrated a fraud upon Appellant.

Beyond the *Lumax Industries* Factors

¶ 44 While the factors noted by the Supreme Court in *Lumax Industries* certainly are relevant to determining whether piercing the corporate veil is appropriate, we do not believe consideration of these factors ends such an analysis. As mentioned above, this Court has stated:

> . . . The general standard for piercing the corporate veil is as follows:
>
> > The legal fiction that a corporation is a legal entity separate and distinct from its shareholders was designed to serve convenience and justice, . . . and will be disregarded whenever justice or public policy require and where rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless. . . . We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate

> corporate identity may properly be disregarded.
>
> **In deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders' traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder.** Thus, we inquire, *inter alia*, whether corporate formalities have been observed and corporate records kept, whether officers and directors other than the dominant shareholder himself actually function, and whether the dominant shareholder has used the assets of the corporation as if they were his own.

The Village, 538 A.2d at 532-33 (emphasis added). In this case, we believe that justice and equity require that Szymanski be held liable for the judgment obtained by Appellant against Delmarva.

¶ 45 We already have determined that Delmarva was undercapitalized, that Szymanski failed to adhere to corporate formalities, and that Szymanski, at least to some extent, intermingled his personal and corporate affairs. We also conclude that our summary of the evidence submitted at trial amply supports a conclusion that Szymanski himself disregarded the separate legal status of Delmarva, thus further rendering Delmarva's corporate form to be a sham.

¶ 46 For instance, Appellant demonstrated that Szymanski held out that David Concrete and Delmarva were the same company, despite the fact that these two corporations were most certainly separate legal entities. In addition, the record makes clear that Szymanski made little effort to ensure that the interests of Delmarva diverged from his personal interests and the interests of his other businesses. While his various corporations supposedly had different suite numbers, they all shared the same office space, and several of these companies, including Delmarva, shared the same computer and sole employee. We further note that Szymanski's difficulties with credibility, including the S & C letter and his noncompliance with discovery requests and orders, calls into question his explanations for incorporating new concrete businesses when he already was the sole shareholder, director, and officer of just that, a concrete business.[19]

¶ 47 While we are unsure as to what the trial court meant in referring to the concept of injustice as ephemeral, it is clear that the separate legal statuses of Szymanski's businesses in general, and Delmarva

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19. The trial court provided the following commentary as to Szymanski's credibility in its order denying Appellant's motion for reconsideration of the court's order granting in part and denying in part the defendants' preliminary objections:

> The motion casts more doubt on the credibility of defendant Szymanski but that is simply like carrying coals to Newcastle.

Trial Court Order, 2/7/05, n. 1.

specifically, were, at best, ephemeral. To shield such behavior with a guise of a corporation would result in an injustice not only to Appellant, but to all those who diligently comply with the responsibility of treating corporations as separate and distinct legal entities. Accordingly, after a review of the evidentiary record, we conclude that Appellant presented evidence that no two reasonable minds could disagree was sufficient to overcome the presumption against piercing Delmarva's corporate veil. We, therefore, hold that, with regard to that portion of the trial court's order denying Appellant post-trial relief as to the issue of piercing Delmarva's corporate veil, the trial court committed an error of law which controlled the outcome of this case. Accordingly, the court erred in denying Appellant judgment notwithstanding the verdict.

¶ 48 We now turn to Appellant's second issue, *i.e.*, whether the trial court erred in finding that Appellant failed to establish its fraudulent transfers claim. We need not reach the merits of this claim.

¶ 49 Ultimately, Appellant seeks the same remedy under this issue that this Court already provided it by deciding Appellant's first issue in its favor. Under the piercing the corporate veil count in Appellant's complaint, he designated Szymanski and Brooks[20] as the defendants and asked for judgment "in the principal amount of $330,195.04, together with punitive damages, interest,

20. As discussed above, the trial court dismissed Brooks from this case for lack of personal jurisdiction. Appellant does not challenge this decision on appeal.

penalties, costs of suit, attorney's fees and such other relief as [the trial court] deems just and proper." Appellant's Complaint, 4/01/04, at 11. Under the fraudulent transfers count in its complaint, Appellant again named Szymanski and Brooks as the defendants, and sought the same relief that it requested under its piercing the corporate veil count. Thus, even if we were to find merit in Appellant's fraudulent transfers claim, we could only award to Appellant that which it already has been awarded, *i.e.*, a judgment against Szymanski.[21]

¶ 50 Lastly, Appellant claims that the trial court erred in dismissing Del Concrete for lack of personal jurisdiction.[22] There are two types of personal jurisdiction

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21. Additionally, Appellant arguably waived its fraudulent transfers issue. In its brief to this Court, Appellant seems to be claiming that Szymanski violated the Pennsylvania Uniform Fraudulent Transfer Act ("UFTA"), 12 Pa.C.S.A. § 5101 *et seq.* While Appellant's complaint and other pre-trial documents vaguely contended that Szymanski made fraudulent transfers, the first time Appellant specifically asserted a violation of the UFTA was in its post-trial brief. Then, in its motion for post-trial relief and in its brief in support of that motion, Appellant again makes vague allegations of fraudulent transfers without citing to or otherwise mentioning the UFTA. Thus, Appellant arguably waived this issue. *Cf. Weir by Gasper v. Ciao*, 364 Pa.Super. 490, 528 A.2d 616, 618 (1987) (" '[O]nly issues specifically raised in post-[trial] motions can be considered and will be preserved for appeal, and issues raised only in briefs in support of those motions may not be considered.' ") (quoting *Cherry v. Willer*, 317 Pa.Super. 58, 463 A.2d 1082, 1084 (1983)).

22. We note that this issue does not implicate Szymanski; rather, the issue clearly is aimed at Del Concrete. Del Concrete

(Cont'd)

the courts of this Commonwealth can exercise over nonresident defendants: general and/or specific personal jurisdiction. *See Mar-Eco, Inc. v. T & R and Sons Towing and Recovery, Inc. et al.*, 837 A.2d 512, 515-16 (Pa.Super.2003) (discussing the differences between general and specific *in personam* jurisdiction). In its brief, despite the well-established law in this area and the plethora of caselaw addressing the same, Appellant cites one case in support of its jurisdiction argument and fails to develop whether the trial court had specific, general, or both types of personal jurisdiction over Del Concrete.

¶ 51 We find Appellant's argument under this issue to be undeveloped and not adequately supported by citation to authority. Thus, the issue is waived. *See, e.g., Slappo v. J's Development Associates, Inc.*, 791 A.2d 409, 418 (Pa.Super. 2002) ("Arguments that are not appropriately developed by citation to authority are waived.").

¶ 52 Judgment vacated. Case remanded for entry of judgment in favor of Appellant. Jurisdiction relinquished.

(Cont'd)

did not file a brief in this Court. Only one Appellee's Brief was filed in this Court, and that brief was filed on behalf of Szymanski. Szymanski's brief nonetheless addresses Appellant's contention that the trial court erred in finding that it lacked personal jurisdiction over Del Concrete, thus further evincing the blurry, if not nonexistent, line between Szymanski and his corporations.

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS, CHESTER COUNTY, PENNSYLVANIA DATED AND FILED JANUARY 11, 2007

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 04-02461

CIVIL ACTION

FLETCHER-HARLEE CORP.,

Plaintiff

VS.

DAVID CONCRETE CORP., INC., et al.,

Defendants

Ethan N. Halberstandt, Esquire, Attorney for Plaintiff
John Brian Frock, Esquire, Attorney for all Defendants, except Dave's Contracting, Inc.
No appearance for Dave's Contracting, Inc.

OPINION

Plaintiff has filed an appeal from our order of November 21, 2006, denying plaintiff's motion for post-trial relief. Pursuant to Pa.R.A.P. No. 1925(a), we herewith file this opinion setting forth the reasons for our order in addition to those set forth in our other orders in this matter and, in particular, in the footnote

to our decision in this matter which was rendered July 28, 2006, a copy of which is attached hereto for the convenience of the reviewing court.

Following the filing of the appeal, plaintiff was directed to file a concise statement of the matters complained of and has done so. Although stretched into eleven paragraphs, the issues raised by plaintiff can be condensed into four: 1) Did we err if failing to disregard the corporate entity Delmarva Concrete? 2) Did we err in failing to find that transfers of funds from Delmarva were fraudulent as to plaintiff? 3) Did we err in failing to impose sanctions upon Defendants for failing to have preserved books and records of Delmarva Concrete? and 4) Did we err in dismissing Del Concrete for lack of personal jurisdiction and thereafter refusing to reconsider that order?

By way of background, plaintiff was a contractor/ construction manager for construction of an elementary school. Plaintiff entered into a contract with Delmarva Concrete, Inc. pursuant to which Delmarva was to provide labor and materials to perform the concrete portion of the project. Disputes arose between plaintiff and Delmarva which eventually resulted in an arbitration proceeding in which plaintiff obtained an award against Delmarva. Plaintiff entered judgment based upon the arbitration award. Plaintiff then brought this action against five (5) defendants seeking to hold them liable for the judgment entered against Delmarva. Delmarva is not a party to this litigation. The primary target of plaintiff's claim in this case is individual defendant

Szymanski. After trial of this case, based upon the evidence presented, we found that the existence of Delmarva should not be disregarded and that none of the defendants herein were liable to plaintiff for the debts of Delmarva. We further found that no transfer of monies from Delmarva to any other entity was fraudulent as to plaintiff.

With respect to plaintiff's argument that we erred by failing to "pierce the corporate veil" of Delmarva and hold one or more of the defendants liable for the debt of Delmarva, plaintiff's argument substantially misperceives the law regarding disregarding the existence of a corporate entity.[1] Plaintiff's argument is based on the premise that a mechanical test or series of tests are to be applied to the affairs of a corporation to determine whether or not to disregard its existence. Plaintiff overlooks the fact that these tests are not themselves the applicable law. Actually, the Superior Court noted as recently as 2001 that there is "no clear test or well settled rule in Pennsylvania . . . as to exactly when the corporate veil can be pierced and when it may not be pierced", *Good v. Holstein*, 787 A.2d 426, 431 (Pa. Super. 2001). Nevertheless, many courts have expressed the applicable law in similar terms. For example, it has been said that a party may pierce the corporate veil of a defendant "wherever equity requires that such be done

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1. Incidentally, even if we were to disregard the corporate existence of Delmarva, no defendant other than Szymanski individually could be found liable for the debts of Delmarva. Szymanski alone was the sole shareholder, officer and director of Delmarva.

either to prevent fraud, illegality or injustice or when recognition of the corporate entity would defeat public policy. . . ." *Village at Camelback Property Owners Association, Inc. v. Carr*, 371 Pa.Super. 452, 461-62, 538 A.2d 528, 533 (1988), *aff'd*, 524 Pa. 330, 572 A.2d 1 (1990). Similarly, "Nevertheless, 'a court will not hesitate to treat as identical the corporation and the individuals owning all its stocks and assets whenever justice and public policy demand and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless.' *Kellytown Co. v. Williams*, 284 Pa.Super. 613, 426 A.2d 663, 668 (1981). '[T]he corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime.' *First Realvest, Inc. v. Avery Builders, Inc.*, 410 Pa.Super. 572, 600 A.2d 601, 604 (1991)(quoting *Kellytown, supra*, at 668)." *Good v. Holstein, supra* at 430. The law, therefore, is not whether or not there was undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs or use of the corporate form to perpetuate a fraud, as these are only factors to be considered in disregarding the corporate form, *Lumax Industries, Inc. v. Aultman*, 543 Pa. 38, 42, 669 A.2d 893, 895 (1995), but, rather, we must examine the evidence for those and other relevant factors to make the ultimate determination of whether or not there was fraud, illegality or injustice or the recognition of Delmarva as a valid corporate entity would defeat some aspect of public policy. In this case, we did consider all the evidence and concluded that the ultimate test as set forth in *Lumax, supra*, and elsewhere has not been met.

We also kept in mind that, "As our Supreme Court has summarized: '[T]here is a strong presumption in Pennsylvania against piercing the corporate veil. *Wedner v. Unemployment Board*, 449 Pa. 460, 464, 296 A.2d 792, 794 (1972) ("[A]ny court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception. . . . Care should be taken on all occasions to avoid making the entire theory of corporate entity * * * useless. *Zubik v. Zubik*, 384 F.2d 267, 273 (3d Cir.1967)"). Also the general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person. *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 468 Pa. 103, 117, 360 A.2d 200, 207 (1976).' " *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, 846 A.2d 1264, 1277-1278 (Pa.Super. 2004).

In our view, the teaching of these authorities is that we must view an entire transaction or series of transactions and not solely the actions of the defendants and Delmarva. There can be little doubt that Delmarva failed to adhere to corporate formalities with the rigor which would be desirable and that the documentation of the transactions between Delmarva and defendant Szymanski was singularly lacking. Where we differ with plaintiff's analysis is the effect of the laissez faire attitude of Delmarva and Szymanski on Szymanski's liability to plaintiff. As we understand plaintiff's position, it is that if plaintiff proves that Delmarva was undercapitalized and failed to adhere to corporate

formalities to a substantial extent, then we must disregard its corporate existence. We disagree. On the contrary, we also consider whether or not there was a substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud and we **also consider** other factors including particularly the transaction between Delmarva and the plaintiff to determine if there were fraud, illegality or injustice or the recognition of Delmarva as a valid corporate entity would defeat some aspect of public policy. Plaintiff's arguments simply confuse the evidence presented with the ultimate legal conclusions which must be drawn. Plaintiff's contention that we did not consider the proper factors in reaching our conclusion is simply wrong. We were aware of the law as set forth in the applicable authorities and considered it. Failing to come to the conclusion for which plaintiff contends is not the same thing as failing to consider the evidence.

Plaintiff argues that we "erred in requiring the plaintiff to prove the elements of common law fraud." Concise Statement, paragraph 4. But fraud is the heart of the issue. As already noted, the ultimate determination which must be made before disregarding the corporate existence of Delmarva is whether or not there has been fraud, illegality or injustice or that the recognition of Delmarva as a valid corporate entity would defeat some aspect of public policy. Here, there was no illegality nor any public policy contravened by recognizing the corporate existence of Delmarva. Therefore, we are left to consider whether there was fraud or injustice, the latter being a particularly

ephemeral concept. In determining whether or not there was any fraud involved, we did consider the well-known definition of fraud as recently reiterated in *Colaizzi v. Beck*, 895 A.2d 36 (Pa.Super. 2006). Plaintiff contends that we erred in so doing but does not suggest any other definition of fraud for this purpose and, in any event, we know of no reason why fraud in this context should mean anything other than what fraud means in any other context. For the reasons set forth in our decision, there can be no doubt that fraud, as so defined, was not proven. And under the circumstances of this case, the injustice required to be found in order to overcome the strong presumption in favor of recognizing the corporate existence of Delmarva simply is not present.

In our view, the case of *Sheetz v. Spagnol*, 224 Pa.Super. 85, 302 A.2d 379 (1973) is helpful in considering the application of the facts of this case to the applicable law. In the *Sheetz* case, the parties entered into a contract in which the individual had certain obligations (which were fulfilled) and the corporation had certain obligations and the individual defendant promised to use his ownership control of corporation to see to it that the corporation paid its obligations which, apparently, it did not. The trial court found the individual's use of the corporation as a shield against personal liability for payment of the purchase price for the stock to be a "grave injustice". The Superior Court disagreed and reversed, holding that "The corporate entity was without any legal basis improperly disregarded by the court below merely to rewrite the contract so as to provide for personal liability

where none was provided." *Id* at 88, 302 A.2d at 381. The Superior Court went on to say that:

> The lower court has in this case, through its improper disregard of the corporate existence, rewritten an explicit contract so as to impose personal liability where none has been contracted. Defendant is not in this case using the corporate fiction to shield himself from liability. There is not the slightest intimation of any fraudulent attempt or calculated intent by defendant Spagnol to conceal himself behind the corporate veil to the detriment of plaintiffs. It is the agreement itself, admittedly valid and freely entered into by the plaintiffs, that shields defendant from the liability sought to be imposed by plaintiffs. To permit the corporate veil to be pierced under these circumstances would be not preventing an injustice but in fact creating an injustice by allowing plaintiffs to impose upon defendant a liability different than that they agreed to impose upon him.

Id at 89, 302 A.2d at 381.

While it is possible that defendant Spagnol had a degree of purity in his corporate transactions that we do not ascribe to defendant Szymanski, nevertheless, Szymanski's dealings with plaintiff Fletcher-Harlee seem more akin to the facts in *Sheetz* than to any other case. In this case the plaintiff entered into a contract

with Delmarva knowing full well that Delmarva was a corporation. Plaintiff asked Delmarva for a few references and "also had D&D (sic)". Notes of Testimony, page 90. (We assume that "D&D" is a typographical error and that plaintiff had a report from Dunn and Bradstreet, commonly referred to as a "D&B".) The references were satisfactory and the D&B didn't provide much information. Notes of Testimony, page 91. There was some reference in the D&B to David Concrete, which plaintiff investigated, and then ultimately entered into a contract with Delmarva. Plaintiff did not request that the contract be bonded or do anything else to assure itself of performance or of a source of recourse if the contract were not satisfactorily performed. Specifically, plaintiff did not request or require a personal guarantee from Szymanski but by this suit are attempting to proceed as if they had. Plaintiff concedes that no information which it received from Szymanski or Delmarva was inaccurate in any way and can point to no way in which it was misled by either Delmarva or Szymanski. Whatever, if anything, the D&B revealed about Delmarva's capitalization (and every other aspect of Delmarva) was satisfactory to plaintiff. Other than clarifying the name of the corporation with whom it was entering into a contract and receiving satisfactory references, plaintiff made no further inquiries of Delmarva and required no other assurances of Delmarva or its president—sole director—sole shareholder Szymanski. There is no evidence that plaintiff was shocked or surprised when it was unable to satisfy its award against Delmarva or that there had been any incorrect or false representations to plaintiff from or on

behalf of Delmarva prior to the time when plaintiff contracted with Delmarva which caused plaintiff to believe that Delmarva had a higher degree of solvency or financial responsibility than proved to be the case.

Nor do we find that the actions of Szymanski or Delmarva artificially or improperly created Delmarva's inability to respond to its creditors. It is true that Delmarva made payments to others, including Szymanski and other companies which were owned by Szymanski but there is no evidence from which we found that the payments were not legitimate business expenses. A company may rent its equipment, even from a company whose sole shareholder is the same person as its sole shareholder, and incur other proper business expenses. While we do not credit Szymanski's testimony to any great extent, we do believe that Delmarva had business expenses and we find nothing in the evidence from which to conclude that but for some improper disbursement of Delmarva's assets, Delmarva could have made any substantial payment to plaintiff.

It is undoubtedly true that Szymanski has used a corporation, Delmarva, to shield himself from potential personal liability. So doing is one of the primary reasons why corporations are formed. To rule that using a corporation to shield oneself from personal liability is *per se* improper and a sufficient basis for disregarding the corporate entity would be to violate the admonition from the Pennsylvania Supreme Court that we are not to make useless the entire theory of corporate entity. Had plaintiff wished to impose personal liability on

Szymanski for Delmarva's obligations, plaintiff could have requested Szymanski's personal guarantee. Szymanski could then have made a business decision as to whether or not he wished to assume that obligation. Szymanski never had to make that decision because plaintiff never requested him to do so. We repeat, from *Sheetz*, *supra*, that here, as in *Sheetz*, "It is the agreement itself, admittedly valid and freely entered into by the plaintiffs, that shields defendant from the liability sought to be imposed by plaintiffs. To permit the corporate veil to be pierced under these circumstances would be not preventing an injustice but in fact creating an injustice by allowing plaintiffs to impose upon defendant a liability different than that they agreed to impose upon him." Given defendant Szymanski's obdurate conduct with respect to discovery and corporate record keeping and his flawed memory during his testimony at trial, it is indeed difficult to visualize any liability imposed upon him as creating an injustice but under the facts of this case, as a matter of law, that would be the result. The difficult result in this case is necessary to preserve the utility of the corporate form of organization. Plaintiff controlled the allocation of risk in the first instance and cannot now reallocate that risk from Delmarva to Szymanski merely because Delmarva is unable to answer for its debts. After all is said and done, all that happened here is that a corporate subcontractor, known by the contractor to be a corporation at the time the contract between them was made, is unable to pay damages to the contractor for the subcontractor's failure to have performed that contract. In the absence of having requested and

obtained from Szymanski a personal guarantee of Delmarva's performance under that contract and in the absence of any action by Szymanski which misled plaintiff in any way, we will not rewrite the contract between plaintiff and Delmarva.

Plaintiff further contends that we erred by failing to find transfers of funds from Delmarva were fraudulent as to plaintiff. Although not specifically stated, we presume that plaintiff contends that we should have found those to whom such transfers were made liable to plaintiff at least to the extent of such transferred amounts. To constitute a fraudulent conveyance, the transfer of debtor's asset must be without receipt of equivalent value and must be made at a time when the debtor is insolvent *Johnson v. Johnson*, 908 A.2d 290, 296 (Pa.Super. 2006). However, as we said in rendering our decision in this matter, plaintiff failed to prove that transfers of assets by Delmarva were other than in payment of valid antecedent debts.

Plaintiff raises two other points. Plaintiff contends that we failed to impose sanctions against defendants for discovery abuses and for spoliation of evidence. On the contrary, we took extraordinary steps with respect to discovery. We adjourned trial after two days of testimony in December, 2005, after defendants had completed their case, to permit plaintiff to conduct additional discovery before presenting their evidence in rebuttal. The initial extension was for a period of 30 to 60 days but that period was further extended upon

the request of plaintiff and the trial was not resumed until May, 2006, by which time we are satisfied that plaintiff had obtained everything in existence to which plaintiff had a right by way of discovery. We also found that defendants did not preserve all of the data which might have been relevant to this case and, for that reason, did infer that such evidence would have been adverse to them. An appropriate remedy for the loss or destruction of evidence by the party controlling it is to apply common sense and draw an adverse inference against that party. *Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 29 (Pa.Super. 2006) citing *Schroeder v. Commonwealth of Pennsylvania, Department of Transportation*, 551 Pa. 243, 710 A.2d 23, 28 (1998). Although a binding finding against a party guilty of spoliation is an option, the severity of that sanction makes it an inappropriate remedy for all but the most egregious conduct. *Id*, citing *Tenaglia v. Proctor & Gamble, Inc.*, 737 A.2d 306, 308 (Pa.Super.1999). An adverse inference is not equivalent to an irrebuttable presumption and even drawing inferences adverse to defendants was not sufficient to change the outcome. Plaintiff also contends that we erred in finding that we had no personal jurisdiction over Del Concrete both initially and later when plaintiff sought to provide "newly discovered evidence." We are satisfied that the record supports our finding that this court lacks jurisdiction over Del Concrete both upon the basis of the evidence initially adduced and even when considering the purported "newly discovered evidence".

For the foregoing reasons and those reasons set forth in the decision referred to above and in the other orders entered in this case, we entered the order from which this appeal has been taken.

BY THE COURT:

s/ [illegible]

Date: January 11, 2007

APPENDIX C — DECISION OF THE COURT OF COMMON PLEAS, CHESTER COUNTY, PENNSYLVANIA FILED JULY 28, 2006

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 04-02461

FLETCHER-HARLEE CORP.,

Plaintiff

VS.

DAVID CONCRETE CORP., INC., et al.,

Defendants.

DECISION

AND NOW, this 28th day of July, 2006, following trial of the above captioned matter by the undersigned, sitting without a jury, we hereby find in favor of all defendants and against the plaintiff in no amount.[1]

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1. Plaintiff obtained a judgment against Delmarva Concrete, Inc. (Delmarva), a corporation which is not a party to this action. Plaintiff brought this action to enforce that judgment against the defendants herein on various theories. The complaint is divided into twelve (12) counts, many of which overlap or set forth theories of liability rather than causes of action. Essentially, plaintiff claims to be entitled to relief on the basis of fraud by one or more of the defendants, that the (Cont'd)

Appendix C

(Cont'd)

corporate entity Delmarva should be disregarded and the defendants treated as the entities responsible for payment of the aforesaid judgment and that the actions of one or more of the defendants constituted transfers of assets from Delmarva, which transfers were fraudulent as to plaintiff. Ultimately, however, the evidence does not support finding the facts necessary to grant plaintiff relief on any basis. To establish fraud, "a plaintiff must prove: (1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result. *Rizzo v. Michener*, 401 Pa.Super. 47, 61, 584 A.2d 973, 980 (1990)." *Colaizzi v. Beck*, 895 A.2d 36, 39 (Pa.Super. 2006). Plaintiff proved no misrepresentations with respect to the formation of the contract which led to the judgment against Delmarva. Plaintiff entered into the contract with Delmarva based upon its own investigation of Delmarva and not on the basis of any statements made by any of the defendants to plaintiff. With regard to the legitimacy of Delmarva, there is a strong presumption in Pennsylvania against piercing the corporate veil. The general rule is that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception. The corporate form is to be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. See *Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, 846 A.2d 1264, 1277-1278 (Pa.Super. 2004). Again, plaintiff's evidence simply fails to establish the facts necessary to disregard the general rule. Much of plaintiff's evidence dealt with transactions by and among the defendants not involving Delmarva. Even if Pennsylvania were to recognize the "single entity" or "enterprise" theory, which currently it does not, the evidence

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fails to demonstrate that Delmarva and any of the defendants, corporate or individual, operated in a manner justifying treating them all, or some of them, as a single entity with Delmarva. Finally, plaintiff alleges fraudulent transfers. A transfer is fraudulent as to a creditor if the creditor's claim arose before the transfer was made and the transfer was made without debtor receiving a reasonably equivalent value in exchange for the transfer and if the debtor was insolvent at the time that the transfer was made. Plaintiff failed to prove that transfers of assets by Delmarva were other than in payment of valid antecedent debts. There is no doubt that defendant Szymanski utilized numerous corporate entities and transferred assets among them as well as to and from himself. These actions, without more, are insufficient to impose liability or to cause us to disregard Delmarva's separate corporate existence. At the heart of this action is the underlying transaction between plaintiff and Delmarva as to which no impropriety of any nature has been demonstrated. True, plaintiff did obtain a judgment against Delmarva and, true, Delmarva did not pay its debt to plaintiff and, true Delmarva, filed for protection under the bankruptcy laws but, equally true, these facts are commonplace and do not give rise to liability on the part of any other party. Plaintiff entered a contract with Delmarva with full knowledge that Delmarva was an independent corporate entity. Plaintiff conducted such investigation as it desired with regard to Delmarva's viability and suitability as a subcontractor. To the limited extent that plaintiff obtained information from and about Delmarva, the information was neither misrepresented nor inaccurate. Plaintiff cannot collect from Delmarva the judgment which plaintiff obtained against Delmarva. Plaintiff is now casting about for any and all other sources from which payment can be obtained. Plaintiff has not proven that any of the defendants in this case are legally responsible for the debt of Delmarva.

Appendix C

BY THE COURT:

s/ [illegible]
J.

APPENDIX D — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED SEPTEMBER 3, 2008

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 28 MAL 2008

FLETCHER HARLEE CORPORATION

v.

DAVID G. SZYMANSKI AND
DAVID CONCRETE CORPORATION, INC.

PETITION OF: DAVID G. SZYMANSKI

Petition for Allowance of Appeal from the
Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 3rd day of September, 2008, the Petition for Allowance of Appeal is **DENIED.**